Supreme Court, U.S.
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In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Respondent acknowledges that when Congress enacted the 1991 Civil Rights Act there was a widespread agreement among the lower courts that section 706(g) of Title VII authorized awards of front pay. In light of the explicit language of section 1981a(b)(2) excluding from compensatory damages any "relief authorized under section [706(g)]", the existence of that legal consensus is dispositive. The rule of Lorillard v. Pons, 434 U.S. 575 (1978), that legislation incorporating sections of prior statue incorporates as well the reigning interpretation of that statute, precludes reexamination of the correctness of the law prevailing in 1991.

Front pay is, indeed, authorized by section 706(g). Such awards fit easily within the general purpose of section 706 to "eliminate the effects of the past . . . discrimination." Albemarle Paper Co. v. Moody, 522 U.S. 405, 418 (1975). Front pay is, in essence, post-judgment backpay. Front pay is an equitable remedy for the same reason that backpay awards are equitable: "the district court retains substantial discretion as to whether or not to award [such relief.]" Id. at 433, (Rehnquist, J., concurring).

Section 1981a(b)(2) explicitly preserves the status and treatment of the Title VII remedies that existed prior to 1991. Section 1981a(c) did not, in authorizing jury trials where compensatory damages are sought, alter by implication the availability of those pre-existing remedies. The avowed intent of Congress in adopting the 1991 Act was to provide discrimination victims with "additional remedies". 105 Stat. 1071. It would pervert the intent of Congress to construe section 1981a(c), or section 1981a as a whole, to limit and in some instances (as here) eliminate the then well established remedy of front pay.

I. THE LANGUAGE OF SECTION 1981a PRECLUDES TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES

The central textual problem faced by respondent is to explain why subsection (b)(2), excluding from the scope of compensatory damages both back pay and "any other type of relief authorized by section [706(g)]", does not exclude front pay. A literal reading of subsection (b)(2) yields a sensible result entirely consistent with the legislative history of the statute. The new monetary remedies are generally subject to caps (to allay fears that awards for compensatory or punitive damages might be excessive) and to a statutory right to trial by jury (long sought by supporters of the legislation); because, however, neither side had any objections to the monetary relief that was already available under section 706(g), it remained unchanged.

Several of respondent's arguments simply ignore subsection (b)(2). Respondent asserts, for example, that "[t]he plain language of future pecuniary loss includes sums for future earnings, front pay." (R.Br. 11). But the interpretation of this statute requires consideration of the plain language of the entire law, not just of three words of one subsection. Respondent's contention does not address the plain language of subsection (b)(2), or even all the language of subsection (b)(3) itself, for respondent does not purport to deal with that portion of subsection (b)(3) explaining that it limits only "compensatory damages under this section." Respondent asserts no more than that the words "future pecuniary loss", considered in isolation, would include losses that are redressed by front pay. But Congress did not use this phrase in isolation. Rather, the words "future pecuniary losses" apply to and limit only those types of monetary relief that are not otherwise excluded from compensatory damages by subsection (b)(2), and subsection (b)(2) in turn excludes front pay from the scope of compensatory damages.

Respondent contends that subsection (b)(3) is of paramount consideration because it "conveys the real change in the organization of damages under the new remedies regime." (R.Br. 11). If the status of front pay has changed, it would assuredly be subsection (b)(3) that worked that alteration; but the question here is whether the 1991 Act alters the treatment of front pay at all. It is subsection (b)(2)which

provides the clearest, and assuredly negative, answer to that question.

Much of respondent's brief is directed at avoiding the problem created by subsection (b)(2) by seeking to show that front pay is not a "type of relief authorized under section [706(g)]." Each of its contentions suffers from the same fatal flaw; on the view of the law advanced by respondent, the other-authorized-relief clause of subsection (b)(2) would necessarily refer to nothing at all, and be completely meaningless.

Respondent and several amici argue that front pay is not within the scope of the other-authorized-relief clause of subsection (b)(2) because front pay is not "specifically authorized" by section 706(g) (emphasis added). Subsection (b)(2), however, excludes from compensatory damages "any . . . relief authorized" by section 706(g) (emphasis added), not relief "specifically authorized" by that section. This argument rests in part on an historical anachronism; section 706(g), enacted in 1964 and amended in 1972, could not have expressly referred to "front pay", that phrase apparently was not coined until 1977. (Pet. Br. 15 n. 8). Most fundamentally, the only type of monetary relief that is "specifically" authorized by section 706(g) is back pay. The other-authorized-relief clause by its express language can refer only to types of authorized relief other than back pay. Thus if as respondent suggests the other-authorized-relief clause means "types of relief other than back pay that are specifically authorized by section 706(g)", it would by definition refer to nothing at all.

Respondent argues as well that section 706(g) never authorized (specifically or otherwise) front pay or any other form of monetary relief except back pay, and that even if it did section 1981a repealed by implication any monetary remedies, other than back pay, previously available under section 706(g). Either argument, however, would remove all monetary relief save for back pay from the remedies authorized by section 706(g), leaving nothing in section 706(g) to which the other-authorized-relief clause of section 1981a(b)(2) could refer.

This Court has consistently refused to adopt an interpretation of a statute which would render a portion of the law utterly redundant. E.g., Hohn v. United States, 524 U.S. 236, 249 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 347 (1998); United States v. Menasche, 348 U.S. 528, 538-39 (1955). Respondent's proposed construction of section 1981a would be even less plausible. The other-authorized-relief clause would not duplicate the reference to backpay; it would have literally no meaning at all. This Court rejected a similar contention in United States v. Alaska, 521 U.S. 1 (1997). In that case section 6(e) of the Alaska Statehood Act had retained for the United States title to lands "withdrawn or otherwise set apart as refuges . . . for the protection of wildlife." 521 U.S. at 55. The Court rejected the conclusion of a Special Master that section 6(e) applied only to established wildlife refuges, but not to lands temporarily set apart pending resolution of a proposal for the creation of such a refuge.

> Under the Master's interpretation, § 6(e) applies only to completed reservations of land. But Congress did not limit § 6(e) to completed reservations. Rather, Congress provided that the United States would not transfer to Alaska lands "withdrawn or otherwise set apart as refuges" for the protection of wildlife. (Emphasis added). The Master's reading of §6(e) would render the broader terminology superfluous."

521 U.S. at 59.

II. SUBSECTION (b)(2) OF THE 1991 ACT CODIFIED THE THEN EXISTING LAW THAT FRONT PAY IS A FORM OF RELIEF AUTHORIZED BY SECTION 706(g)

Respondent properly acknowledges that as of 1991 there was a widespread, longstanding and virtually

unquestioned[1] consensus among the lower courts that front pay was among the remedies authorized by section 706(g). "Respondent does not contest that the lower courts have long considered front pay as a form of prospective relief." (R.Br. 13 n. 9).[2] We noted in our opening brief some forty-one pre-1991 circuit court opinions approving front pay. (Pet. Br. App. A). All of these decisions, respondent now insists, were in error. "[T]he early cases from the courts of appeals after the 1972 [amendments to the Civil Rights Act] are singularly deficient in analysis of their equity powers." (R.Br. 34 n. 38). "[T]he courts erroneously categorized front pay as

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[1] As of 1991--and indeed, to this day--no circuit court had ever held that front pay was not available under section 706(g). As we explained in our opening brief, the eleven circuits to reach this issue had all upheld such relief.

Respondent notes that before 1991 a single decision in the Seventh Circuit had noted that the question was as of then unresolved in that circuit. (R.Br. 22, citing McKnight v. General Motors Corp., 908 F. 2d 104, 116 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1991)). Within a year of the adoption of the 1991 Act, however, the Seventh Circuit joined all the other circuits in holding that front pay awards were indeed within the discretion of the district court. McKnight v. General Motors Corp., 973 F. 2d 1366, 1369 (7th Cir. 1992). Decisions in the Seventh Circuit have been particularly emphatic in insisting that the pre-1991 availability of front pay means that such awards are not subject to the caps in section 1981a(b)(3). Pals v. Schepel Buick & GMC Truck, Inc., 220 F. 3d 495 (7th Cir. 2000); Williams v. Pharmacia, Inc., 137 F. 3d 944 (7th Cir. 1998); see R.Br. 14, 21.

[2] R.Br. 8 ("before 1991 many lower courts had held that . . . it was within their equitable power to grant . . . front pay"), 14 (referring to "moneys formerly awarded as 'front pay'"), 15 ("federal district judges did award front pay on an apparent theory that courts could fashion monetary remedies when reinstatement was deemed inappropriate"), 33 (after the adoption of the 1972 amendments to Title VII "courts began awarding front pay").

equitable relief." (R.Br. 33). Widespread though they were, "awards of front pay under section 706(g) were, prior to 1991, contrary to legislative intent." (R.Br. 33).

It is far too late in the day to reopen this question. This Court has repeatedly emphasized that "[w]hen . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). That presumed knowledge is important precisely because Congress is deemed to have incorporated into the new law not only the text of the prior statute, but also the well established interpretations of that earlier law.

This Court deems Congress to be familiar with the law prevailing at the time when it acts, and construes new legislation accordingly, not only because this is a reliable and objective method of discerning congressional intent, but also because the failure to interpret statutes in this manner would utterly confound the legislative process. Congress cannot express its will in an effective and predictable manner unless the terms and phrases which it utilizes to frame legislation continue in subsequent years to be accorded the same meaning and legal significance that they had when the legislation was written. Where the popular usage of particular words has changed over time, this Court has been careful to construe the language of earlier legislation in light of contemporaneous meaning. E.g., St. Francis College v. Al-Khazraji, 481 U.S. 604, 610-12 (1987). The central purpose of the maxim of construction noted in Lorillard v. Pons is to assure that the courts will not, by reinterpreting after the fact an earlier statute on which Congress had relied, give to the later statute a meaning Congress did not intend. This Court has adhered to that principle even when members of the Court may have

disagreed with earlier interpretations on which Congress would have relied.[3]

Thus in a case such as this the intent of the Congress which adopted the 1991 Act is of controlling importance. In Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), in determining whether the Commodities Exchange Act authorized an implied cause of action, the Court considered only the state of the law, and thus presumed the congressional intent, when the statute had been extensively revised in 1974:

> [W]e must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy . . . . When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already

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[3] Cannon v. University of Chicago, 441 U.S. 677 (1979), and Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983), held in sharply divided opinions that an implied cause of action exists to enforce, respectively, Title IX and Title VI. Subsequently, in the Rehabilitation Act Amendments of 1986, Congress provided that in suits against a state under those statutes plaintiffs would have "such remedies [as] are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). The meaning of the 1986 legislation necessarily depended on what rights plaintiffs had against non-state defendants. Against that background, this Court emphatically refused to reconsider the correctness of the caselaw as it had stood in 1986, insisting that the 1986 legislation was a "validation" of then prevailing law. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 72 (majority opinion), 78 (Scalia, J., concurring)(1992).

existed; the question is whether Congress intended to preserve the pre-existing remedy.

456 U.S. at 378-79 (footnote omitted). Merrill Lynch concluded that an implied cause of action existed because such actions under the CEA were "a part of the 'contemporary legal context' in which Congress legislated in 1974", 456 U.S. at 381, even though the Court might well have reached a different conclusion had it applied to the original CEA the more stringent legal standards established in 1975 by Cort v. Ash, 422 U.S. 66 (1975). This Court has applied this method of interpretation where the legal consensus existing at the time Congress acted had been established by lower court decisions. Lindahl v. OPM, 470 U.S. 768, 780 (1985); Lorillard v. Pons, 434 U.S. 575, 580 n. 7 (1978).

We noted in our opening brief that interpreting section 1981a to impose on front pay a cap that did not exist prior to 1991 would be squarely inconsistent with Congress' express intent that the 1991 Act provide "additional" remedies.[4] Respondent argues that all the pre-1991 front pay decision were in error, and that no front pay could properly have been awarded until Congress adopted the 1991 Civil Rights Act. On respondent's view the 1991 Act thus provided "additional" remedies because it authorized capped front pay where no front pay, at all, had previously been permissible. (R.Br. 33). But that assuredly was not how Congress would have

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[4] Such a result would be palpably inconsistent with section 2 of the Act, which provided in part:

"The Congress finds that--

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

* * *

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment."

101 Stat. 1071. (emphasis added).

understood the legislation at the time it was passed. In 1991, Congress could only have concluded (albeit, in respondent's view, mistakenly), that front pay was already available, and that any imposition of the subsection (b)(3) caps on front pay would thus reduce rather than expand existing remedies. Under Lorillard Congress is presumed to know the law prevailing at the time it legislates, not assumed to have had the prescience to anticipate that this Court might years later be persuaded to overturn a hitherto prevailing legal consensus.

Respondent's historical contentions present a compelling illustration of the dangers of departing from the principle of interpretation emphasized in Lorillard v. Pons. The task before this Court is to ascertain the intent of Congress in enacting the 1991 Civil Rights Act. Respondent urges this Court, however, to disregard the undisputed state of the law in 1991 regarding front pay, the unchallenged evidence that members of Congress in 1991 had actual knowledge of that accepted interpretation, and the unambiguous statements regarding the meaning of section 1981a made in 1991 by Senator Danforth and the other six Republican Senators who actually drafted and introduced section 1981a.[5] The correct interpretation of the 1991

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[5] Particularly where no committee reports exist, or address the meaning of legislation framed on the floor of the House or Senate, this Court has regularly relied on statements or memoranda placed in the record by the authors of the legislation or compromise. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 350-52 (1976).

Respondent dismissed repeatedly as "partisan" the views expressed by the eight Republican Senators who drafted section 1981a. (R.Br. 26 n. 28, 28). But in this instance those views were also expressly endorsed by the House and Senate Democrats who were managing the bill for their own party. Indeed, there is no dispute that every member of Congress who specifically discussed front pay agreed that it was not part

legislation, respondent insists, is instead to be divined by reading the 1765 Commentaries of Sir William Blackstone, Justice Story's Commentaries on Equity Jurisprudence (first published in 1835), and, most recently, legislation adopted by the British Parliament in 1858 at the behest of Baron (later Earl) Hugh McCalmont Cairns. (R.Br. 37-41). This entire approach is unsound. Regardless of whether Justice Story is, as respondent urges, "the maven of American equity jurisprudence" (R.Br. 37), the 1991 legislation at issue in this case was actually framed by Senators John Danforth, Arlen Specter, John Chaffee, William Cohen, James Jeffords, Dave Durenberger and Mark Hatfield, and was approved by the members of the 102nd Congress. It is their intent that is of controlling importance.

III. FRONT PAY IS A FORM OF RELIEF AUTHORIZED BY SECTION 706(g) OF TITLE VII

Even if this Court were to revisit the longstanding legal consensus regarding front pay, the result would be no different. The propriety of front pay awards under section 706(g) is readily apparent. The remedial principles governing monetary relief under section 706 were spelled out in this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975):

> It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," Brown v. Swann, 10 Pet. 497, 503 (1836) . . . . Where racial discrimination is concerned, "the [district] court has not merely the power but

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of compensatory damages.

> the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). . . . The "make whole" purpose of Title VII is made evident by the legislative history.

422 U.S. at 418-19.

The Court noted that Congress, when it amended section 706(g) in 1972[6] to authorize "any other equitable relief as the court deems appropriate", had "strongly reaffirmed the 'make whole' purpose of Title VII." 422 U.S. at 421. Senator Williams' authoritative section-by-section analysis of the 1972 legislation explained:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [S]ection 706(g) . . . is intended to make the victims of unlawful discrimination whole, and . . . the attainment of that objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972).

Measured against this standard, the propriety of front pay is clear. Where an individual has been denied, or dismissed from, a job because of race, gender, religion or national origin, the difference between the victim's

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[6] Respondent suggests that back pay was the only form of monetary relief authorized under Title VII when it was originally enacted in 1964. (R.Br. 31). In fact, however, section 706(g) broadly authorized the court to "order such affirmative action as may be appropriate, which may include . . . back pay." 78 Stat. 261.

subsequent income and the wage or salary he or she would have earned but for the discrimination is (assuming reasonable mitigation efforts have occurred) a "discriminatory effec[t] of the past." 422 U.S. at 418. An order directing the culpable defendant to pay a sum equal to that income differential is the classic example of make whole relief under Albemarle. Where that income differential occurred prior to the entry of judgment, the relief usually accorded under Title VII is denoted "backpay". But if the very same discriminatory effect continues after final judgment because reinstatement is delayed or impracticable, relief for that injury is warranted for precisely the same reason that it was warranted for the pre-judgment period. Although redress for the post-judgment period is denoted "front pay" rather than "backpay", it serves the identical make whole purpose, albeit for a different period of time.

The fact that front pay (like backpay) is a form of monetary relief does not, as respondent contends, mean that it cannot be "equitable relief" within the meaning of section 706(g). Albemarle explained that backpay is equitable because, unlike damages, the decision whether to make such awards remains a matter of discretion:

> [B]ackpay is not an automatic or mandatory remedy . . . . [T]he court's discretion is equitable in nature . . . . "[E]quity eschews mechanical rules . . . [and] depends on flexibility." Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes.

422 U.S. at 415-17. Then Justice Rehnquist emphasized that monetary relief under Title VII remained equitable so long as that discretion existed:

> To the extent . . . that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature

> of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. . . . If the award of backpay is indeed governed by equitable consideration, . . . factors . . . which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration by the District Court. It . . . must avail itself "of the freedom given it by Congress to attain just results in diverse, complicated situations." Phelps Dodge Corp. v. NLRB, 313 U.S. [177], 198 [(1941)].

422 U.S. at 433-47 (concurring opinion). In Curtis v. Loether, 415 U.S. 189 (1974), the Court held in similar terms that the presence or absence of such discretion is of critical importance in determining whether monetary relief is equitable in nature.[7] Historically the existence of such flexibility has been one of the key characteristics which distinguished equity from actions at law.[8]

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[7] "In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy . . . . [T]he courts have relied on the fact that the decision whether to award backpay is committed to the equitable discretion of the trial judge." 415 U.S. at 197.

[8] 1 Pomeroy's Equity Jurisprudence § 109 (2d ed. 1892):

> "The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances . . . . Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances . . . .[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case . . . ."

Respondent insists that all monetary relief is presumptively legal rather than equitable (R.Br. 17), that any monetary remedy is legal in nature if damages might have been awarded at law to redress the same injury (R.Br. 22), and that equitable restitution extends only to cases in which an employer has been unjustly enriched by the Title VII violation. (R.Br. 17). These contentions, however, are as applicable to backpay as to front pay, and do not provide a basis for concluding that only the former is available under section 706(g). Front pay is in essence post-judgment backpay. In some respects front pay is even more clearly equitable in nature than backpay. Front pay is often intertwined with injunctive relief, such as where the court orders front pay until a plaintiff is reinstated, or does so for the purpose of providing an incentive for reinstatement. Ordinarily the fact that a remedy is prospective in nature makes it unlike damages. Compare Milliken v. Bradley, 433 U.S. 267, 288-90 (1977), with Edelman v. Jordan, 415 U.S. 651, 668 (1974). This Court need not address whether front pay and backpay are "equitable" for Seventh Amendment purposes; it is enough that Congress assuredly intended to treat the two remedies alike.

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1 Story's Equity Jurisprudence § 28 (14th ed. 1918):

> "[O]ne of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and may adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law . . . are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant."

Front pay fits easily into Albemarle's delineation of the type of monetary relief that is equitable[9]--both equitable within the meaning of section 706(g) and equitable under the Seventh Amendment.[10] As we explained in our opening brief, the decision whether to award front pay has always been a matter of discretion. (Pet. Br. 40-41 and App. C). As a practical matter, courts have routinely exercised their equitable discretion to deny front pay. Respondent does not contend that front pay awards have ever been mandatory. The lower courts have construed Title VII only to accord to the trial courts the "power" to award front pay (R.Br. 8, 15), not to create an absolute duty to do so; where reinstatement is not possible, front pay awards have been made "sometimes" (R.Br. 3) or "often" (R.Br. 4), but assuredly not always. In the instant case, we do not urge that a finding on remand that reinstatement is not possible would ipso facto entitle petitioner

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[9] Albemarle makes clear that even a lump sum front pay order is equitable in nature. Regardless of the status of such lump sum orders, there is no question that a court would be using its equitable powers if it issued a prospective injunction directing an employer to pay to a discrimination victim a specified sum per month until reinstatement was possible, or if the court simply retained jurisdiction and periodically issued additional back pay orders. Respondent does not address whether such orders would be equitable, or whether they would be subject to the subsection (b)(3) caps.

[10] Respondent contends that its construction of the 1991 Civil Rights Act is necessary to avoid a constitutional problem. (R.Br. 15). In light of Albemarle, however, there is little merit to respondent's argument that the Seventh Amendment requires that a jury award front pay. Even if the Seventh Amendment does apply to front pay awards, that would not render Title VII or the 1991 Act unconstitutional. Neither statute forbids jury trials regarding monetary claims (e.g., backpay) that are not part of compensatory damages. And there is assuredly no Seventh Amendment issue in the instant case, in which neither party requested a jury at all.

to front pay; such a determination would merely provide the district court with an occasion to exercise its discretion regarding front pay in the manner contemplated by Albemarle.

That backpay and front pay are equally available under section 706(g) is illustrated by the circumstances of this case. Petitioner was terminated in February 1996, and continues to this day to be denied the $60,000 annual salary she would have earned had the proven Title VII violation not occurred. In its August 1998 decision the district court awarded petitioner backpay for the period from February 1996 through August 1998. Respondent characterizes such backpay orders as equitable because they have "the function of restoring money unlawfully withheld since employment termination." (R.Br. 18). But in the period since the district court opinion, DuPont has continued to withhold the money it would have paid petitioner but for the discriminatory dismissal. If the district court were to decide the instant case today, rather than having done so in 1998, petitioner could unquestionably obtain backpay for the years from 1998-2001, as well as for 1996-1998. An award of the same amount of relief for the same period in time is no less equitable in character merely because the trial court's liability determination occurred in 1998 rather than in 2001. Wherever the distinction may lie under either section 706(g) or the Seventh Amendment between relief that is and is not equitable in nature, the distinction assuredly does not depend on the fortuity of when the district court's opinion was entered.

The fact that section 1981a(c) now authorizes[11] jury trials where compensatory or punitive damages are sought does not, as respondent contends, transform front pay from equitable relief under section 706(g) into a form of compensatory damages. Having in subsection (b)(2) expressly sought to preserve the status of existing section 706(g) remedies, Congress cannot in adopting subsection (c) have intended solely by implication to bring about the opposite result. Many provisions of the 1991 Civil Rights Act were indeed adopted for the express purpose of overturning judicial decisions with which Congress disagreed. But when that was Congress's intent, it specified the decisions which it was overturning, and explained its reasons for doing so. There is absolutely nothing in the voluminous legislative history of the Act reflecting the slightest disagreement with the then prevailing caselaw regarding front pay. The stated purposes of the Act in this regard is limited to "respond[ing] to recent decisions of the Supreme Court." 105 Stat. 1071. No mention is made of responding to any circuit court opinions.

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[11] Section 1981a does not, as respondent repeatedly asserts, direct that all claims for compensatory damages be decided by a jury. (R.Br. 8, 9, 10, 15, 16). The statute merely authorizes any party to demand a jury trial where compensatory damages are sought. In the instant case, of course, neither party did so. Section 1981a would have no application if a plaintiff only sought relief under section 706(g). Even where a plaintiff sought both front pay and damages, and a jury trial was requested on most issues, it would not follow that either party would want the jury to determine front pay. Our review of the reported cases involving front pay indicates that this does not occur.

IV. RESPONDENT'S PROPOSED INTERPRETATION OF TITLE VII WOULD ENTAIL FUNDAMENTAL CHANGES IN THE AVAILABLE REMEDIES WHICH CONGRESS DID NOT INTEND AND WHICH NO MEMBER OF CONGRESS EVER ADVOCATED

Respondent proposes sweeping change regarding front pay. Although respondent's immediate concern is with the subsection (b)(3) caps, it correctly understands that the other-authorized-relief provision of subsection (b)(2) cannot be circumvented without a sea change in the treatment of front pay. Respondent's brief, expressly and of necessity, entails five distinct alterations in existing law.

First, respondent urges that front pay should be subject to the subsection (b)(3) caps. In cases where damages for pre-judgment injuries already exceed the cap, front pay would be abolished. In cases where the front pay awardable under pre-1991 law would have exceeded the cap, the amount of that award would now be reduced.

Second, respondent insists that the award of front pay is entirely a matter for the jury. (R.Br. 7-10). Respondent does not advance the hybrid theory propounded by the Sixth Circuit in Hudson v. Reno that the court should decide whether front pay should be awarded, while the jury decides only the amount of front pay.

Third, respondent insists that front pay was never a permissible remedy under section 706(g), and only became available when Title VII was amended to authorize compensatory damages. (R.Br. 16-23). Were this Court to so hold, front pay would as a consequence be impermissible in cases under Title VII, as well as under Title I of the Americans With Disabilities Act, for violations that do not involve intentional discrimination. E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (job requirement with discriminatory effect); 42 U.S.C. § 12112(b)(5)(requiring employer to reasonably accommodate disabled employee). In these cases the only prospective remedy that a court could afford to a plaintiff who had been unlawfully dismissed from

or denied a job would be to order reinstatement, even though that often would require displacing an existing employee.

Fourth, respondent insists that front pay relief which in the past would have been discretionary must now be treated as common law compensatory damages, a change which would make such monetary awards mandatory whenever past discrimination would in fact cause future, post-judgment wage losses. See Smith v. Wade, 461 U.S. 30, 52 (1983)("Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss"). Plaintiffs who have requested a jury trial, respondent correctly observes, have "the right to have a jury award compensatory damages" for injuries caused by unlawful discrimination. (R.Br. 9).

Fifth, if the Court were to hold, as respondent urges, that front pay is inherently a form of legal relief, that would have substantial consequences for discrimination cases brought under 42 U.S.C. § 1981 (for race discrimination) and § 1983 (for unconstitutional discrimination). In those cases as well front pay awards would now be mandatory, juries (if requested) rather than judges would award them, and there would be no statutory cap on those now obligatory awards.

There is nothing in the text or legislative history of section 1981a to suggest that Congress favored or even considered making any such changes. The jury trial provision which respondent asserts assured this sea change was present in the earliest version of the bill in February, 1990.[12] Until the sponsors agreed in October 1991 to caps on compensatory damages, converting front pay to a form of compensatory damages would have changed Title VII in a manner entirely unfavorable to employers. The opponents of the legislation would assuredly have objected vociferously had they understood the proposed legislation to have any such effect; the proponents of these bills, although entirely outspoken in successfully urging adoption of a number of statutory changes

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[12] S. 2104, 101st Cong., 2d Sess. § 8.

favorable to Title VII plaintiffs, never claimed that they wanted to make front pay mandatory or to transfer its administration to juries. The absence of such objections or arguments confirms that subsection (b)(2) meant precisely what it said--that then existing section 706(g) remedies, including front pay, remained unaffected.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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